

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

INTRODUCTION

Pro se plaintiff Jeffrey Sharp, acting in his capacity as personal representative for the Estate of Marjory Sharp (plaintiff), brings three claims asserting violation of the 14th Amendment, false imprisonment and wrongful death against defendants Carol Callahan (Callahan); Oregon Cascades West Council of Governments (OCWCG); Samaritan Health Services (Samaritan); and Independence Health and Rehabilitation

Center (IHRC). [#2- pp.12-13]. Plaintiff also moves the court for appointment of *pro bono* counsel. [#13].

Defendants Callahan and OCWCG move to dismiss because plaintiff, "a non-lawyer, may not represent the estate in this case" in which there are multiple beneficiaries. [#10; #12].

BACKGROUND

This action appears to arise as a result of Jeffrey Sharp's dissatisfaction with his late mother's treatment by various care-givers and care-giver providers, while she was in a government funded residence, as well as his arrest for elder abuse¹. [#21-Ex. 7, p. 4, ¶¶9-10].

Plaintiff does not dispute that there are multiple beneficiaries to Marjory Sharp's estate² or that he is not an attorney licensed to practice in Oregon. [#2-Ex.1; #11].

DISCUSSION

1. Motions to Dismiss

A Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) is proper only where there is a lack of a cognizable legal theory or the

¹ After a bench trial, plaintiff was found not guilty of the charge of criminal mistreatment in the first degree on February 2, 2012. [#2-Ex.11].

² The record before the court indicates that Mrs. Sharp died without a will and that she had at least two sons, Jeffery and Christopher, thus, under ORS 112.045 her estate has at least two beneficiaries. [#2; #10]. It is unclear from the record whether the estate had any creditors.

absence of sufficient facts alleged under a cognizable theory. *Balisteri v. Pacific Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). The issue is not whether the plaintiff is likely to succeed on the merits but if the complaint is sufficient to entitle the plaintiff to proceed beyond the pleadings in an attempt to establish his claim. *De La Cruz v. Torrey*, 582 F.2d 45, 48 (9th Cir 1978).

Generally, when ruling on a 12(b)(6) motion, a court may only consider allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). However, the court need not accept allegations as true that contradict facts that may be judicially noticed by the court. *Shwartz v. KPMG, LLP*, 476 F.3d 756, 763 (9th Cir 2007). Additionally, the court's reliance on judicially-noticed documents does not convert a motion to dismiss into a summary judgment motion. *Intri-Plex tech., Inc. V. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir.2007).

The general rule establishing the right of an individual to represent himself in federal courts of the United States is intended to provide individuals with equal access to the courts. See 28 U.S.C. §1654. In other words, in an action brought by a *pro se* litigant, the real party in interest must be the person who "by substantive law has the right to be enforced." *C.E. Pope*

Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir.1987); see also *McShane v. United States*, 366 F.2d 286, 288 (9th Cir.1966) (the privilege to represent oneself *pro se* provided by section 1654 is personal to the litigant and does not extend to other parties or entities).

Where, as here, an estate has multiple beneficiaries and creditors, an attorney must represent a personal representative before the court. *Simon v. Harford Life, Inc.*, 546 F.3d 661, 664 (9th Cir.2008) (courts have routinely adhered to the general rule prohibiting *pro se* plaintiffs from pursuing claims on behalf of others in a representative capacity). These limits on *pro se* representation serve the interests of the represented party as well as the interests of adversaries and the court. *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir.1987) (trustee attempting to represent a trust *pro se* was not, pursuant to 28 U.S.C. §1654, a "party" conducting his "own case personally" as he was not the beneficial owner of the claims being asserted).

Under the circumstances in this case, the action cannot be described as the litigant's own, because the personal interests of the estate, other survivors, and possible creditors, will be affected by the outcome of the proceedings. A non-lawyer representative, such as plaintiff, can not litigate claims that are not personal to him.

2. Motion for Appointment of Counsel:

Plaintiff also moves the court for appointment of *pro bono* counsel. [#13]. There is no constitutional right to counsel in a civil case. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986). While this court has discretion to request volunteer counsel for indigent plaintiffs in exceptional circumstances, the court has no power to make a mandatory appointment. 28 U.S.C. § 1915(d); *Mallard v. U.S. Dist. Court of Iowa*, 490 U.S. 296, 301-08 (1989).

In order to determine whether exceptional circumstances exist, the court evaluates the plaintiff's likelihood of success on the merits and the ability of the plaintiff to articulate his claim in light of the complexity of the legal issues involved. *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir.1990); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.1986). However, "[n]either of these factors is dispositive and both must be viewed together before reaching a decision on request of counsel under section 1915(d)." *Wilborn*, 789 F.2d at 1331.

Although the facts and legal issues involved in this case are not of substantial complexity, in light of plaintiff's *in forma pauperis* status and his inartful attempts to articulate a claim, the clerk of the court shall submit this matter to the volunteer panel for the limited purpose of review to determine

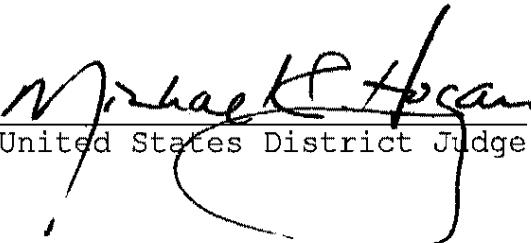
possible *pro bono* representation. 28 U.S.C. §1915(e)(1).

CONCLUSION

Based on the foregoing reasoning, defendants Motion to Dismiss [#10] is GRANTED. Plaintiff's Motion for Appointment of *pro bono* Counsel [#13] is DENIED. Plaintiff is ordered to show cause in writing, why this action should not be dismissed unless there is an appearance by plaintiff's counsel within 90 days.

IT IS SO ORDERED.

DATED this 26th day of June, 2012.



United States District Judge